

Municipal Storm Water Permitting in California

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TABLE OF CONTENTS

I.	INTRODUCTION	246
II.	THE FEDERAL-STATE STRUCTURE	248
III.	THE STORM WATER POLLUTION PROBLEM	252
IV.	STRUCTURE AND THEORY: THE SAN DIEGO MS4 PERMIT.....	254
V.	EMERGING LEGAL CONCERNS	256
	A. California Environmental Quality Act (CEQA)	256
	B. Section 402(p) of the Clean Water Act.....	262
	C. Section 101(b) of the Clean Water Act and Local Authority.....	265
	D. Watershed and Third Party Liability Considerations	266
	E. Proposition 218: Articles XIII C and XIII D of the California Constitution	270
	1. Sections 6 and 2(e) of Article XIII D: "Incident of Property Ownership" Fees Require Voter Approval	273
	2. Section 6(c) of Article XIII D: Exemption for Sewer, Water, and Refuse Collection Services	277
VI.	CONCLUSION	283

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I. INTRODUCTION

This Article deals with the regulation of discharges of waste in storm water from municipal separate storm sewer systems (MS4s).¹ In the last few years, significant regulatory action has occurred in this area, especially in California. The permitting of MS4s has generated political controversy in the regulated community, which has bubbled over into legal challenges.²

Although some legal questions have been settled by the courts, the

1. An MS4 is defined broadly by the federal regulations as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains)” owned or operated by a state, city, town, or other public body having jurisdiction over the disposal of storm water. Storm Water Discharges, 40 C.F.R. § 122.26(b)(8) (2002). Note that this definition of an MS4 is not limited to municipally owned storm sewer systems.

Municipal storm water federal regulations are being implemented in two phases, depending on the classification of the municipality as “large,” “medium,” or “small.” The phase I regulations apply to large communities with populations of 250,000 or more and medium communities with populations of 100,000 or more people. 40 C.F.R. § 122.26(b)(4), (b)(7). These regulations were issued by the Environmental Protection Agency (EPA) on November 16, 1990. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (to be codified at 40 C.F.R. pts. 122–24). The EPA subsequently issued amended regulations on March 21, 1991. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadline for Group Applications, 56 Fed. Reg. 12,098 (Mar. 21, 1991) (to be codified at 40 C.F.R. pt. 122). The phase II regulations were published as final rules on December 8, 1999 and became effective on February 7, 2000. National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (to be codified at 40 C.F.R. pts. 9, 122–24). They cover “regulated small” MS4s located in smaller urbanized areas that are not regulated by phase I, including military bases. 40 C.F.R. § 122.26(b)(16). Phase II regulation covers more than municipal systems. Storm water systems on military bases, large hospitals, prison complexes, school districts, colleges, highways, and other thoroughfares are also covered. *Id.* Operators of “regulated small” MS4s are required to obtain permit coverage by March 10, 2003. National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. at 68,722. This two-phased approach allows permitting authorities to initially focus on those municipalities with the most serious storm water problems. *See* *Env'tl. Def. Ctr. v. EPA*, No. 00-70014, 2003 WL 113486 (9th Cir. Jan. 14, 2003) (generally affirming the phase II rules against statutory, administrative, and constitutional challenges, but remanding to correct procedural defects in the general permit program).

2. Although the focus of this Article is on California law, storm water legal challenges are occurring outside California. *See, e.g.*, *Judgment of Dismissal, Tualatin Riverkeepers v. Browner* (D. Or. 2001) (No. 00-793 BR), *noted in* Alexandra Dapolito Dunn, *Municipal Storm Water Permits—Why Numeric Limits Don't Fit*, WATER QUALITY & WETLANDS COMMITTEE NEWSL., Dec. 2001, at 4, 5; *Miss. River Revival, Inc. v. Minn. Pollution Control Agency*, No. C1-01-23, 2001 Minn. App. LEXIS 855 (Minn. Ct. App. July 31, 2001); *City of Irving, Texas, Mun. Separate Storm Sewer Sys.*, No. 00-18 (E.A.B., July 16, 2001), *available at* <http://www.epa.gov/eab/disk11/irving.pdf> (last visited Jan. 1, 2003).

situation is dynamic. At the federal level there have been two notable storm water decisions, *Defenders of Wildlife v. Browner* and *Environmental Defense Center v. U.S. Environmental Protection Agency*.³ There have been two administrative decisions issued by the State Water Resources Control Board.⁴ Petitions to the State Water Resources Control Board challenging the Los Angeles, Orange County, and Santa Ana storm water permits have been filed and are pending resolution.⁵ In late 2001, a lawsuit was filed by the Building Industry Association challenging the San Diego MS4 permit⁶ and requesting a writ of mandate to set it aside. In mid-2002, the California Court of Appeal for the Sixth District decided *Howard Jarvis Taxpayers Ass'n v. City of Salinas*,⁷ in which the city's storm drainage fee was held invalid for failing to comply with the voter approval requirements of proposition 218. Additional administrative and judicial legal challenges to these and other storm water permits are likely in the future.

3. *Defenders of Wildlife*, 191 F.3d 1159 (9th Cir. 1999) (holding that municipal storm-sewer discharge permits are not required to comply with state water-quality standards, but the EPA has discretion to impose such standards); *Env'tl. Def. Ctr.*, 2003 WL 113486.

4. *In re* Cities of Bellflower, SWRCB Order WQ 2000-11, 2000 WL 33158724 (Oct. 5, 2000); Bldg. Indus. Ass'n of San Diego County & W. States Petroleum Ass'n, SWRCB Order 2001-15 (Nov. 15, 2001), available at <http://www.swrcb.ca.gov/resdec/wqorders/2001/wqo/wqo2001-15.pdf> (last visited Jan. 1, 2003).

5. See, e.g., Petition of County of Los Angeles and Los Angeles County Flood Control Discharge, Los Angeles Region, Jan. 11, 2003, SWRCB/OCC File No. A-1448 (on file with author); Petition of Los Angeles County Economic Development Corporation, City of Lake Forest, City of Los Alamitos, City of Stanton, Santa Ana Region, Jan. 18, 2002, SWRCB/OCC File No. A-1463(a) (on file with author); Petition of Mission Viejo, San Diego Region, Feb. 13, 2002, SWRCB/OCC File No. A-1465(c) (on file with author).

6. State Respondents' Memorandum of Points and Authorities in Opposition to Complaint/Petition for Writ of Mandate, Bldg. Indus. Ass'n of San Diego County v. State Water Res. Control Bd. (Cal. Super. Ct. 2003) (No. GIC 780263). The San Diego storm water permit is "area-wide." It applies to the following cities: Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, and Vista. It also includes the County of San Diego and the San Diego Unified Port District. California Regional Water Quality Control Board, *Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego, and the San Diego Port District, Order No. 2001-01*, at 1 (Feb. 21, 2001), available at http://www.swrcb.ca.gov/rwqcb9/programs/sd_stormwater.html [hereinafter *Order No. 2001-01*].

7. 121 Cal. Rptr. 2d 228 (Cal. Ct. App. 2002), review denied, 2002 Cal. LEXIS 5938 (Cal. Super. Ct. 2002).

Predictably, public policy decisionmakers and attorneys practicing environmental and land use law will be swept up in the controversy surrounding the subject of municipal storm water regulation. The stakes are high. The goal of this Article is to provide a framework for understanding some of the emerging legal issues.

II. THE FEDERAL-STATE STRUCTURE

The Federal Water Pollution Control Act, more commonly referred to as the Clean Water Act (CWA), is based on Congress's authority under the Commerce Clause "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁸ It is premised on the realization that the protection of aquatic resources necessitated broad authority to control water pollution and that the discharge of pollutants be controlled at the source.⁹

The CWA generally uses two different regulatory approaches or philosophies to control water pollution. The predominant regulatory strategy is based on controlling the discharge of pollutants through the use of effluent limits, which are set in uniform, technology-based terms.¹⁰ Dischargers are legally authorized to release pollutants¹¹ to waters of the United States pursuant to the effluent limits contained in their permit. The other approach focuses on regulating dischargers based on their impact to the receiving water quality. Discharge limits are set in terms of the amount of pollution allowed in a defined water body or water body segment with consideration given to local conditions, such as the beneficial uses of the receiving water and its assimilative pollutant capacity.¹²

The starting point to understanding the storm water regulation is the CWA. It is the principal federal statute dealing with water pollution, including MS4 storm water permitting.¹³ The CWA consists of a number of general programs, including the National Pollutant Discharge

8. 33 U.S.C. § 1251(a) (2000).

9. S. REP. NO. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742.

10. JOHN-MARK STENSVAAG, MATERIALS ON ENVIRONMENTAL LAW 608 (1999).

11. The term "pollutant" includes sewage, chemical wastes, biological materials, heat, industrial, municipal, and agricultural waste. 33 U.S.C. § 1362 (2000). The term "pollution" is broadly defined to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.*

12. OLGA L. MOYA & ANDREW L. FONO, FEDERAL ENVIRONMENTAL LAW: THE USER'S GUIDE 295-308 (2d ed. 2001).

13. The basic structure of the CWA was established in 1972. It has been subjected to several significant sets of amendments since then. Important changes were made to the CWA in 1977, 1987, and 1990. *Id.* at 295-96.

Elimination System (NPDES) point source program,¹⁴ the pretreatment program applicable to indirect dischargers,¹⁵ the nonpoint source (NPS) program,¹⁶ the dredge and fill program,¹⁷ and the oil spill program.¹⁸

Municipal storm water regulation is part of the NPDES permit program, although it also seeks to deal with some of the problems common to NPS pollution. In 1987, Congress added section 402(p) to the CWA.¹⁹ Congress directed that storm water discharges be regulated as “point sources”²⁰ and then established a framework for issuing permits.²¹

Section 402(p)(3)(B) is the controlling federal statutory provision for municipal storm water discharges. The statute establishes the following federal permit requirements for municipal storm water discharges:

Permits for discharges from municipal storm sewers—

- (i) may be issued on a system- or jurisdiction-wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable [MEP], including management practices,

14. Clean Water Act, § 301(a), 33 U.S.C. § 1311(a) (2000); *see also* 33 U.S.C. § 1342 (2000).

15. Clean Water Act, § 307(b), 33 U.S.C. § 1317(b) (2000) (pretreatment effluent standards).

16. Clean Water Act, §§ 208, 319, 33 U.S.C. §§ 1288, 1329 (area-wide waste treatment management; NPS management programs).

17. Clean Water Act, § 404, 33 U.S.C. § 1344 (2000) (dredge and fill).

18. Clean Water Act, § 311, 33 U.S.C. § 1321 (2000) (oil spill program).

19. Pub. L. No. 100-4, § 405, 101 Stat. 7, 69–71 (1987). *See also* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,991–92 (Nov. 16, 1990) (to be codified at 40 C.F.R. pts. 122–24). Section 402(p) requires permits to be obtained for the following types of storm water discharges: those associated with industrial activities, those from municipal storm sewer systems serving populations over 100,000, discharges with respect to which a permit had been issued prior to 1987, and any discharge determined by the permitting authority to be contributing to a violation of water quality standards or a significant source of pollutants to waters of the United States. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. at 47,992.

20. The CWA defines a point source as “any discernible, confined and discrete conveyance,” including such physical structures as pipes or ditches. Clean Water Act, § 502, 33 U.S.C. § 1362 (2000).

21. The CWA also regulates industrial storm water discharges under the NPDES program. *See* Clean Water Act § 402(p), 33 U.S.C. § 1342(p)(3)(A). Federal regulations identify eleven categories of industry that are covered, including construction activities where the construction disturbs five acres or more. *See* *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992) (holding that the EPA’s decision to regulate construction sites only over five acres is arbitrary and capricious).

control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.²²

Since 1987, the U.S. Environmental Protection Agency (EPA) has promulgated regulations governing storm water discharges. They are contained primarily in 40 C.F.R. § 122.26,²³ with additional references in Parts 122, 123, and 124. As would be expected, these regulations add considerable implementing detail to the statutory mandate found in section 402(p).

Although MS4 permits are NPDES permits, they differ considerably from the technology-based treatment standards and numeric effluent criteria associated with “end-of-pipe” discharges.²⁴ The rationale for treating storm water discharges differently from traditional end-of-pipe discharges is based on the variability of storm water discharge. Storm water is highly variable, both as to flow and as to pollutant type and concentration. The MEP standard was created by Congress to allow permits to be tailored to the specific nature of MS4 discharges. Included in this grant of flexibility was the idea that the permit requirements could be directed at sources of pollution on a system-wide basis.

Issuing permits on a system-wide basis allows municipal entities and other political subdivisions responsible for different parts of a single MS4 system to be co-permittees on a single permit.²⁵ This approach is advantageous because it facilitates coordination and consolidation of MS4 activities and spreads the burden for monitoring, analysis, and development and implementation amongst those parties to the permit.

The next important structural consideration to understand is the role of the states in administering the CWA’s provisions. The EPA is authorized by the CWA to delegate NPDES permit issuing responsibilities to a state provided that the state has a permit program that is substantially equivalent to the federal program.²⁶ California has enacted equivalency legislation authorizing it to implement and administer the CWA.²⁷ The authority to issue MS4 permits is exercised

22. 33 U.S.C. § 1342(p)(3)(B).

23. *See supra* note 2 and accompanying text.

24. *See* Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 57,425, 57,425–426 (Nov. 6, 1996).

25. *See* Clean Water Act § 402(p)(3)(B)(i), 33 U.S.C. § 1342(p)(3)(B)(i).

26. 33 U.S.C. § 1342(b).

27. CAL. WATER CODE § 13370(c) (West 1992).

[I]t is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal

by the nine California Regional Water Quality Control Boards within the state.²⁸ The State Regional Water Quality Control Board has administrative review authority over the regionally issued storm water permits.²⁹

In the early 1990s, regional boards began issuing MS4 permits based on the provisions in the CWA. Some MS4 permits, for example those issued by the San Diego Regional Water Quality Control Board to San Diego and Orange County, “exceed” the requirements of federal law.³⁰ As discussed in the Part below dealing with the California Environmental Quality Act,³¹ this feature of going beyond the federal requirements is legally significant.

The topic of storm water regulation has recently attracted the attention of the California Legislature. In 1998, it added the Storm Water Enforcement Act³² to the Water Code. In 2001, it added section 13383.5 to the Water Code requiring the State Water Resources Control Board to develop, by January 1, 2003, minimum storm water monitoring and

regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.

Id.; see also Storm Water Enforcement Act of 1998, CAL. WATER CODE § 13399.43 (West Supp. 2003) (“For purposes of this chapter, ‘NPDES permit’ means a permit issued under the national pollutant discharge elimination system program in accordance with the Clean Water Act.”) (citation omitted).

28. CAL. WATER CODE §§ 13200–13228 (West 1992 & Supp. 2003); see also *id.* § 13160 (West 1992) (dealing with the state board’s authority to exercise any powers delegated to California by the CWA).

29. CAL. WATER CODE § 13320 (West 1992).

30. See San Diego Regional Water Quality Control Board, Comparison Between the Requirements of Tentative Order 2001-01, the Federal NPDES Storm Water Regulations, the Existing San Diego Municipal Storm Water Permit (Order 90-42), and Previous Drafts of the San Diego Municipal Storm Water Permit, agenda item 5, attach. 4, at 2–3 (Dec. 13, 2000) (on file with author). The comparison states:

Approximately 60% of the requirements in Tentative Order 2001-01 are based solely on the 1990 federal NPDES Storm Water Regulations. The remaining 40% of the requirements in the Tentative Order “exceed the federal regulations.” Requirements that “exceed the federal regulations” are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.

Id. at 2. The comparison goes on to discuss the provisions that exceed the federal regulations. “The 40% of the requirements in Tentative Order 2001-01 which ‘exceed the federal regulations’ are based almost exclusively on (1) guidance documents developed by the USEPA; and (2) the SWRCB’s orders describing statewide precedent setting decisions on MS4 permits.” *Id.* at 2–3.

31. See discussion *infra* Part V.A.

32. 1998 Cal. Stat. 998 (1998) (codified at CAL. WATER CODE §§ 13399.25–43 (West Supp. 2003)).

sampling requirements for specified municipalities and industries.³³ As the politics of storm water regulation heat up, which they undoubtedly will, one can confidently predict more involvement by the legislature.

The federal-state structural relationship is fundamental to understanding storm water regulation in California. Decisionmakers and attorneys practicing in this area must understand both the CWA and the Porter-Cologne Water Quality Control Act,³⁴ which is the water quality control law through which California implements the CWA.

III. THE STORM WATER POLLUTION PROBLEM

The significance of the storm water problem can be easily stated: it has been found to be the leading cause of water quality impairment in California,³⁵ as well as nationally. In November 2001, the State Water Resources Control Board and Regional Water Quality Control Boards adopted a strategic plan for the next five years. One of the identified challenges contained in the plan is reducing storm water pollution. The strategic plan captures the essence of the storm water problem:

The recent repeated closures of beaches in Southern California due to excessive bacteria levels in coastal waters has highlighted the significance of contaminated storm water in California. During a storm, or other events where water flows across large expanses of pavement, that water may pick up pollutants along the way. Water that flows down driveways and streets and into a gutter eventually makes its way into a storm drain, and then flows directly to a lake, river or the ocean. Common pollutants that are picked up along the way include motor oil, pesticides, brake dust, pet wastes, paint, and household chemicals.

These pollutants can have harmful effects on drinking water supplies, recreational use, and wildlife. The federal Clean Water Act requires that various industrial facilities, construction sites, and urban areas with more than 100,000 people, control the amount of pollutants entering their storm drain systems. This requirement will soon be expanded to include smaller communities as well. Storm water pollution is an issue that touches almost

33. 2001 Cal. Stat. 492 (codified at CAL. WATER CODE § 13383.5(b) (West Supp. 2003)) ("This section only applies to regulated municipalities that were subject to a storm water permit on or before December 31, 2001, and to regulated industries that are subject to the General Permit for Storm Water Discharges Associated with Industrial Activities Excluding Construction Activities.").

34. CAL. WATER CODE §§ 13200–13270 (West 1992 & Supp. 2003)). For a useful introduction to the Porter-Cologne Act, see William R. Attwater & James Markle, *Overview of California Water Rights and Water Quality Law*, 19 PAC. L.J. 957, 994–1012 (1988). The reader is cautioned, however, that changes to federal and state law have occurred since this article was published in 1988.

35. Storm Water Enforcement Act § 1, 1998 Cal. Stat. 998 ("The Legislature hereby finds and declares all of the following: (a) Unregulated storm water runoff is a leading cause of contamination of the state's surface water and groundwater.").

every Californian who is both part of the problem and part of the solution. Our challenge is two-fold: to educate the general public; and to work together with all parties to ensure compliance with pollutant discharge laws.³⁶

The waste products in urban storm water runoff frequently contain a toxic brew of metals, pesticides, fertilizers, animal waste, trash, and numerous other toxic substances. This toxic brew often journeys through a community's storm sewer system,³⁷ picking up additional pollutants along the way, before being released into the community's receiving waters.³⁸ These receiving waters may be coastal waters, bays, lagoons, groundwater, or surface waters, including creeks, rivers or streams. What is not mentioned by the strategic plan is that this dangerous concoction usually is discharged to the receiving waters without the benefit of any type of treatment to protect the public.

The adverse impact with this release of the waste in urban runoff has broad environmental and economic consequences. Urban storm water runoff may harm a community's general hydrology system by increasing stream bank erosion, degrading benthic habitat, poisoning sediment, decreasing aquatic diversity, and limiting water contact recreational opportunities, including but not limited to beach closures. Thus, it is not surprising that the waste in contaminated urban storm water has broad adverse effects on a community's environment, human health and safety,³⁹ and economy.⁴⁰

36. STATE WATER RESOURCES CONTROL BOARD & REGIONAL WATER QUALITY CONTROL BOARDS, STRATEGIC PLAN 8 (2001), *available at* http://www.swrcb.ca.gov/strategicplan/01strategic_plan.pdf. The state and regional boards completed a strategic plan in 1995 and revised it in 1997. *Id.* at 4. The current strategic plan was promulgated on November 15, 2001. Its purpose is to highlight priorities that need to be addressed during the next five years. *Id.*

37. As used in this Article, the term "storm sewer system" is broadly inclusive. It includes roads with drainage systems, municipal streets, curbs, gutters, ditches, natural drainage features or channels, and man-made channels or storm drains. When natural drainage features or channels, such as an urban stream, are used as part of the storm sewer system, they are both part of the municipal conveyance system and the receiving water.

38. As used in this Article, the term "receiving waters" also is broadly inclusive. It includes, for example, creeks, streams, rivers, lakes, reservoirs, estuaries, bays, and the ocean.

39. *Order No. 2001-01*, *supra* note 6, at 2-3, finding 6. Urban runoff contains pollutants, which threaten human health. *Id.* Human illnesses have been linked to recreation activities in the proximity of storm drains, and pollutants from urban runoff can affect humans by entering the food chain. *Id.*

40. See, e.g., Verne G. Kopytoff, *Storm Drains Pose San Diego Health Risk*, N.Y. TIMES, Jan. 5, 1997, § 5, at 3 (issuing a travel advisory due to dangerous storm water discharges); Kemp Powers, *Beaches that Make You Go Ewwwww! Don't Go Near the Water*, FORBES, July 3, 2000, at 295 (discussing vacation beach closures due to storm

The public is clearly concerned with water pollution. According to a recent research study by the California Water Awareness Campaign, the quality and quantity of water available rank as the two most important environmental issues facing California.⁴¹ Of the ten statewide issues, water quality and water supply ranked at the top with eighty-three percent and eighty-two percent of the respondents rating them, respectively, as “very important.” Although water quality and water supply were separated for purposes of the survey, water quality and water supply are often interdependent as a practical matter.⁴² The amount of usable water for beneficial purposes is directly related to its quality.

IV. STRUCTURE AND THEORY: THE SAN DIEGO MS4 PERMIT

One administrative effect of municipal storm water permitting is to subject many industrial and construction activities to dual, overlapping regulation both at the state and local level. Industrial and construction activities are regulated independently by statewide general permits,⁴³ as well as under local land use permitting. This system of dual oversight of industrial and construction storm water discharges means that regulatory enforcement actions to secure compliance may be brought either by the

water runoff contamination). There is no accurate way to assess the economic effect of such negative press, but one can reasonably assume that it will have an adverse economic impact on the tourist economy.

Another economic impact is on real estate values. One EPA study revealed that property values in the area of Lake Champlain in the Northeastern United States with good water quality were valued an average of twenty percent more than property around poor water quality. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *LIQUID ASSETS: A SUMMERTIME PERSPECTIVE ON THE IMPORTANCE OF CLEAN WATER TO THE NATION'S ECONOMY* 8 (1996).

41. THE CALIFORNIA WATER AWARENESS CAMPAIGN, PUBLIC INFORMATION AND EDUCATION ASSESSMENT STUDY 2 (2001), *available at* <http://www.wateraware.org/surveyresults.html>.

42. *See, e.g.*, *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 166 (1986) (describing California's water problem as “not a lack of water but uneven distribution of water resources”).

43. In California, statewide general industrial and construction permits are adopted by the State Water Resources Control Board. They generally prohibit the discharge of pollutants and nonstorm water, and require the use of BMPs to reduce site runoff. Industrial facilities subject to the CWA must either comply with the general permit or obtain individualized NPDES permits. *See State Water Res. Control Bd., Water Quality Order No. 97-03-DWQ, Nat'l Pollutant Discharge Elimination Sys. General Permit No. CAS000001*, at V (1997), *available at* <http://www.swrcb.ca.gov/stormwtr/industrial.html>. Dischargers subject to the general permit must develop and implement an effective Storm Water Pollution Prevention Plan (SWPPP) “to reduce or prevent pollutants associated with industrial activity in storm water discharges and authorized non-storm water discharges.” *Id.* at IX; *see also State Water Res. Control Bd., Order No. 99-108-DWQ, Nat'l Pollutant Discharge Elimination Sys. General Permit No. CA000002* (1998), *available at* <http://www.swrcb.ca.gov/stormwtr/construction.html> (statewide general construction storm water permitting for construction activities).

local authority or by the state.⁴⁴

Municipal storm water permits vary in their technical detail. Nevertheless, the San Diego MS4 permit is a useful vehicle to reify some of the legal issues surrounding the topic of storm water permitting generally. The San Diego permit is complex.⁴⁵ It is fifty-two pages in length, with another thirty or so pages of appendices. Notwithstanding this complexity, the permit contains certain basic operating provisions, which may be likened to the gears of a car transmission.

The operative provisions of the permit are as follows: (1) the findings on which the permit is based,⁴⁶ (2) the general prohibition provisions⁴⁷ that apply unless the discharge qualifies for an exemption,⁴⁸ (3) the Model Standard Urban Storm Water Mitigation Plan (SUSMP),⁴⁹ (4) the

44. See, e.g., Storm Water Discharges, 40 C.F.R. § 122.26(c) (2001) (federal regulation of storm water discharges associated with industrial and construction activity).

45. See generally *Order No. 2001-01*, *supra* note 6.

46. The standard of judicial review applicable to administrative decisions is important to the legal analysis of a storm water permit. Review by the trial court is governed by the California Water Code. It provides that “the court shall exercise its independent judgment on the evidence.” CAL. WATER CODE § 13330 (West 1996 & Supp. 2003). In exercising its judgment, the trial court must afford a strong presumption of correctness concerning administrative findings, and the party challenging the permit bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. See *Fukuda v. City of Angels*, 997 P.2d 693, 700 (Cal. 1999). The compatibility of the presumption of correctness with the independent judgment standard was explained by the California Supreme Court in *Fukuda*.

[T]he presumption provides the trial court with a starting point for review but it is only a presumption and may be overcome. Because the trial court ultimately must exercise its own independent judgment, the court is free to substitute its own findings after first giving due respect to the agency’s findings.

Id. at 701. While the trial court is required to review the evidence supporting a storm water permit under the independent judgment standard of review, the substantial evidence test would apply to any appeal.

47. Discharges from the MS4 that have not been reduced to the MEP are prohibited. *Order No. 2001-01*, *supra* note 6, at 9. Discharges are also subject to all Water Quality Control Plan (Basin Plan) restrictions, which means that discharges from the MS4 cannot cause or contribute to the exceedance of water quality standards. *Id.*

48. Certain nonstorm water discharges in identified categories may be exempted from the general prohibition provided they are determined not to be a significant source of pollution by the co-permittee. The identified categories which may be exempted are based on the federal regulations. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1) (2001).

49. The SUSMP addresses how the co-permittees will manage urban runoff from “new development” and “significant redevelopment,” which are terms of art defined in the permit. *Order No. 2001-01*, *supra* note 6, at 16. It identifies minimum mandatory best management practice (BMP), criteria for sizing BMPs, and criteria for infiltration BMPs. *Id.* at 3, finding 11.

Jurisdictional Urban Runoff Management Program (JURMP),⁵⁰ (5) the Watershed Urban Runoff Management Program (WURMP),⁵¹ and (6) various monitoring and reporting requirements.

As previously noted, MS4 permitting is based primarily on the CWA. It also is based on state law.⁵² Simply put, the San Diego MS4 permit requires co-permittees, who authorize and realize the benefits from urban development,⁵³ to exercise their land use authority as it pertains to planning, construction, and use and operation with an eye toward water quality impacts. The permit is premised on the theory that the co-permittees' authority to regulate development carries with it the corresponding responsibility to address water quality impacts within its jurisdiction. It is also predicated on the notion that pollution prevention and control by the authorizing land use entity provides the greatest and most cost-effective opportunity to protect water quality.

V. EMERGING LEGAL CONCERNS

A. *California Environmental Quality Act (CEQA)*

Under CEQA,⁵⁴ a public agency must prepare an environmental impact report (EIR) for projects that may have a "significant environmental effect."⁵⁵ As previously stated, the San Diego MS4 permit, as well as that issued to Orange County, exceeds the federal regulations and is based in part on California law.⁵⁶ As a result, the Building Industry Association (BIA) has challenged the San Diego

50. The JURMP documents describe how the co-permittees will manage urban runoff within their respective jurisdictions. Co-permittees also have the discretion to develop a model JURMP. *Id.* at 13–14.

51. The WURMP operates in tandem with the JURMP. It is based on the principle that urban runoff does not respect political boundaries, and that watershed-based land use planning enables multiple jurisdictions to work together to plan for the protection of shared natural water resources. *Id.* at 7, finding 30.

52. *Id.* at 8, finding 37 (listing California state legal authority for order).

53. *Id.* at 4, finding 17.

Urban development has three major phases: (1) land use planning for new development; (2) construction; and (3) the "use" or existing development phase. Because the Co-permittees authorize, permit, and profit from each of these phases, and because each phase has a profound impact on water quality, the Co-permittees have commensurate responsibilities to protect water quality during each phase.

Id. One may take issue with the finding that co-permittees "profit" from these development phases on the theory that they are nonprofit entities.

54. CAL. PUB. RES. CODE §§ 21000–21177 (West 1996).

55. "'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." CAL. PUB. RES. CODE § 21068.

56. *See supra* note 30.

permit on the theory that it was issued in violation of CEQA.⁵⁷ The regional board maintains that federal law authorizes California to adopt the provisions contained in the MS4 permit, and thus CEQA is not applicable.⁵⁸ The BIA challenge raises an issue of general importance: the application of CEQA to storm water permits that contain provisions either more numerous, more specific or detailed, or more stringent than those contained in federal law or regulations.

The BIA argues that CEQA applies, that the San Diego permit was issued in violation of CEQA, and that both the regional board and state board erroneously applied section 13389 of the Water Code, which contains the CEQA exemption. It maintains that section 13389 only exempts permit provisions required to meet the nondiscretionary requirements of the CWA. In brief, the BIA claims that the California Legislature did not give the regional board a CEQA “pass” for anything other than the CWA mandates and that the San Diego MS4 permit goes far beyond the federal requirements, thus subjecting it to CEQA review.⁵⁹

The analysis of this position usefully begins by identifying two considerations that are not in issue. First is the purpose of CEQA. It is intended to provide the fullest possible protection to the environment within the reasonable scope of the statutory language.⁶⁰ It is geared toward accomplishing this goal by informing government decisionmakers and the public about the potential adverse environmental effects of proposed projects and by preventing avoidable environmental damage from those projects.⁶¹ Thus, CEQA is intended to both inform and prevent avoidable harm.

57. Verified Petition for Writ of Mandate Re: (1) California Environmental Quality Act; (2) Clean Water Act; (3) California Water Code; (4) California Constitution; (5) California Code of Civil Procedure; (6) California Administrative Procedures Act; (7) Statutory Record Review and California Constitution; Verified Complaint for (8) Declaration Relief; and (9) Injunctive Relief, Bldg. Indus. Ass’n of San Diego County v. State Water Res. Control Bd. (Cal. Super. Ct. 2001) (No. 780263) [hereinafter Petition for Writ of Mandate]. The BIA petitioned the court for a writ of mandate asking that the storm water permit be vacated and reissued in compliance with law, after consultation with the petitioners. *Id.* at 1.

58. Brief for State of California at 3–4, Bldg. Indus. Ass’n of San Diego County v. State Water Res. Control Bd. (Cal. Super. Ct.) (No. 780263).

59. Petition for Writ of Mandate, *supra* note 57, at 10–12.

60. “It is the intent of the Legislature that all agencies of the state government . . . shall regulate such activities so that major consideration is given to preventing environmental damage” CAL. PUB. RES. CODE § 21000(g) (West 1996).

61. DANIEL J. CURTIN, JR., CURTIN’S CALIFORNIA LAND USE AND PLANNING LAW 111–12 (20th ed. 2000).

The second point not in issue is that projects proposed by developers and others subject to the MS4 permit are subject to CEQA review at the time they apply to the local land use authority for development, thus insuring environmental review. CEQA applies to such proposals as part of the normal development process. In other words, the CEQA exemption applies only to the issuance of the MS4 permit by the regional board; the exemption is not relevant to projects proposed by developers pursuant to the MS4 permit.

The issuance of the MS4 permit by the regional board in and of itself has no immediate impact on the environment. It simply establishes requirements that must be met to be in compliance with federal and state law. Perhaps this is the reason why the BIA alleges that the plaintiffs “will be adversely affected by the changes to the environment caused by the Permit in that Petitioners and their members engage in homebuilding, construction, development, the provision of municipal services including firefighting, and the exercise of municipal land use authority,”⁶² not that the environment will be adversely affected.

Assuming arguendo that CEQA applies to the MS4 permit issued by the regional board, the correct application of the CEQA exemption found in section 13389 of the California Water Code is critical. This section provides: “Neither the state board nor the regional boards shall be required to comply with the provisions of [CEQA] prior to the adoption of any waste discharge requirement”⁶³ As used in California, the term “waste discharge requirement” is the statutory equivalent of the term “NPDES permit” employed in the CWA.⁶⁴

To the extent that the MS4 permit is based on the CWA, the statutory language of section 13389 exempts the issuance of the permit from CEQA. This conclusion is clear. The California Supreme Court has observed: “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature Words used . . . ‘should be given the meaning they bear in ordinary use.’”⁶⁵

The state board relied on this principle in its recent MS4 administrative decision holding that section 13389 generally exempts the issuance of MS4 permits from the CEQA process.

As we have stated in several prior orders, the provisions of CEQA requiring adoption of environmental documents do not apply to NPDES permits. BIA contends that the exemption from CEQA contained in section 13389 applies

62. Petition for Writ of Mandate, *supra* note 57, at 11.

63. CAL. WATER CODE § 13389 (West 1992).

64. *Id.* § 13374.

65. Delaney v. Superior Court, 789 P.2d 934, 940–41 (Cal. 1990) (citation omitted).

only to the extent that the specific provisions of the permit are required by the federal Clean Water Act. This contention is easily rejected without addressing whether federal law mandated all of the permit provisions. The plain language of section 13389 broadly exempts the Regional Water Board from the requirements of CEQA to prepare environmental documents when adopting “any waste discharge requirement” pursuant to Chapter 5.5 (13370 et seq., which applies to NPDES permits). BIA cites the decision in *Committee for a Progressive Gilroy v. State Water Resources Control Board*. That case upheld the State Water Board’s view that section 13389 applies only to NPDES permits, and not to waste discharge requirements that are adopted pursuant *only* to state law. The case did not concern an NPDES permit, and does not support BIA’s argument.⁶⁶

The *Gilroy* decision is factually distinguishable and does not squarely support the state board’s decision. In *Gilroy*, a final EIR was prepared for the expansion of a wastewater treatment plant, which admittedly was a “project” under CEQA.⁶⁷ The court found that the challenged orders were issued under the exclusive authority of the Porter-Cologne Act. The orders were not required by the CWA.⁶⁸ Therefore, *Gilroy* does not specifically answer the question of whether the statutory exemption applies to situations when the permit generally is based on federal law, but certain provisions of the permit exceed the requirements of federal law.

The CWA generally recognizes independent state authority to enact and implement its own standards and requirements provided that they are at least as stringent as those required by the CWA.⁶⁹ With respect to the specific regulation of storm water, the CWA provides that permits “[s]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design and engineering methods, *and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.*”⁷⁰ The italicized language authorizes states to adopt storm water controls that are determined appropriate even though they may exceed federal requirements.

Although undoubtedly authorized by federal law to act, state law controls the application of the CEQA exemption. Chapter 5.5 of the

66. *In re Bldg. Indus. Ass’n of San Diego County & W. States Petroleum Ass’n*, SWRCB Order 2001-15, 13 (Nov. 15, 2001) (citation omitted), *available at* <http://www.swrcb.ca.gov/resdec/wqorders/2001/wqo/wqo2001-15.pdf>.

67. *Comm. for a Progressive Gilroy v. State Water Res. Control Bd.*, 237 Cal. Rptr. 732–33 (Ct. App. 1987).

68. *Id.* at 732.

69. Clean Water Act § 510, 33 U.S.C. § 1370 (2000).

70. Clean Water Act § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).

Water Code,⁷¹ which contains the exemption, was added by the California Legislature in order to allow the state to implement or administer the provisions of the CWA.⁷² Read in isolation, section 13389 provides a strong argument for exempting the MS4 permit from CEQA. Moreover, the argument is buttressed by the fact that it is the only section to specifically reference CEQA.

However, statutes should be read in context. Section 13372 provides the arguable context for narrowly reading the exemption. It states that chapter 5.5 “shall be construed to assure consistency with the requirements for state programs implementing” the CWA and that “[t]he provisions of this chapter *shall apply only to actions required under [CWA] and acts amendatory thereof or supplementary thereto.*”⁷³ This limitation raises the derivative question as to whether the MS4 permit is an “action” required by the CWA. Unfortunately, the section does not define the term “action.”

On the one hand, one may argue that the term “action” is defined by the initiating federal requirement to issue MS4 permits and the accompanying authorization to go beyond federal law. According to this view the permit is indivisible, and the term “action” includes all of the constituent parts of the permit regardless of whether they exceed federal law. This interpretation would mean that the CEQA exemption applies.

On the other hand, if the term “action” refers to the specific provisions of the permit, then the exemption might not apply to those permit provisions based exclusively on state law. But this construction is problematic. Section 13377 of the Water Code authorizes regional boards to issue waste discharge requirements that “apply and ensure compliance with all applicable provisions of the act [CWA]” as well as “any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.”⁷⁴ This section is instructive to the proper interpretation of the term “action.” It supports the view that the term “action” should be broadly construed to cover all of the provisions of the permit because the legislature used specific language, “standards or limitations,” when it wanted to identify specific provisions within the permit that go beyond the requirements of the CWA.

Given the broad grant of authority under federal law and the expressed intent by the California Legislature to exercise its authority, the preferred interpretation is to apply the exemption without delineating the overlap with

71. CAL. WATER CODE §§ 13370–13389 (West 1992 & Supp. 2003).

72. *Id.* § 13370.

73. *Id.* § 13372 (emphasis added).

74. *Id.* § 13377.

federal law. There are several policy considerations that justify treating the permit as a whole for purposes of applying the CEQA exemption.

Unless one was to successfully argue that the permit in its entirety is subject to CEQA, which is a dubious proposition, the permit would have to be dissected in order to determine which parts were subject to CEQA. The first policy concern is whether this approach is practical. The selective application of CEQA to parts of the permit would necessitate successfully disentangling the federal and state provisions in order to apply CEQA to the state-based part of the permit. This task would be both factually and legally difficult, especially in light of the broad grants of authority.⁷⁵

Another policy consideration is whether the purposes of CEQA would be advanced by selective application to the state-based portion of the permit. Actually, the opposite might occur. The goal of protecting the environment could be undermined by a narrow or selective application of the exemption. The administration of CEQA would become significantly more complicated and administratively difficult in the area of storm water permitting. For example, if the state-based monitoring requirement were found to go beyond that required under the CWA, the monitoring requirement would be arguably subject to CEQA, but presumably not the other provisions of the permit.

Finally, the CEQA process applies to “projects,”⁷⁶ which are required by law to be defined with sufficient specificity to make the CEQA process capable of sensible application. Given that the MS4 area permit covers a large geographic region, properly defining the project so that CEQA could be sensibly applied would be next to impossible. The reason is straightforward. There is no actual project until a specific proposal is submitted by someone subject to the permit. This point is

75. The URMPs impose restrictions that apply to infiltration and groundwater. Federal courts are divided on the application of the CWA to groundwater. *Compare* Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (holding that “[n]either the Clean Water Act nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters”), *with* Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319–20 (S.D. Iowa 1997) (holding that “[b]ecause the CWA’s goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater”). In *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’r*, the Supreme Court may have indicated that isolated ground water is not subject to CWA jurisdiction, but this interpretation is far from certain. 531 U.S. 159, 171–72 (2001).

76. CAL. PUB. RES. CODE § 21065 (West 1996) (defining the term “project”).

critical to the future success of storm water permitting. Unless the federal and state-based requirement could be separated and sensibly applied to the facts, applying CEQA would undoubtedly mean the end to area-wide storm water permits, a result which would contravene the express language of CWA authorizing such permits.

B. Section 402(p) of the Clean Water Act

The application of the MEP standard has generated controversy. One concern involves the analytical link between the MEP⁷⁷ standard and the “water quality standard” that defines the water quality goals for a water body.⁷⁸ This concern is acute when a municipal storm water permit prohibits storm water discharges that cause or contribute to a violation of water quality standards and also imposes the MEP standard. Undoubtedly, some of the controversy surrounding the application of the MEP stems from the fact that neither the CWA nor federal regulations define the term “MEP.” In this situation, the correct fit between the two standards is critical. It is also a focal point for potential litigation.

The phase II storm water regulations provide an explanation for the absence of a definition: “There is no regulatory definition of MEP in order to allow the permitting authority and regulated MS4s maximum flexibility in their interpretation of it” as they develop and implement their

77. The EPA has identified the following factors as relevant to the MEP standard: (1) storm water discharge size, (2) climate, (3) implementation schedules, (4) current ability to finance the program, (5) hydrology, (6) capacity to perform operation and maintenance, (8) conditions of receiving waters, and (9) other specific local concerns and aspects included in a comprehensive watershed plan. National Pollution Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124) (phase II storm water rules).

78. Federal water quality standards consist of two components: (1) the goals or designated beneficial uses for waters, and (2) the water quality criteria to support those goals or beneficial uses. Water Quality Standards, 40 C.F.R. § 131.3(i) (2001). The water quality criteria identify the constituent concentrations or levels to support a designated beneficial use. 40 C.F.R. § 131(b). The concentrations or levels are expressed either in numeric or narrative terms, and are simply the means to reach the stated goal. *Id.* For example, a designated beneficial use might be “contact water recreation,” such as swimming, wading, and water skiing. The associated water quality criteria for contact water recreation expressed in numeric terms might be that the average level of fecal coliform bacteria concentration for any thirty day period shall not exceed 2000 cells/100 milliliters of water. A narrative or descriptive formulation might provide that the waters “be free of floating debris, scum and other materials.” For an example of a Water Quality Control Plan, see generally *Water Quality Control Plan for the San Diego Basin* (9), available at <http://www.swrcb.ca.gov/rwqcb9/programs/basinplan.html>.

The California Water Code uses the term “water quality objectives” as an equivalent to the federal term “water quality criteria.” CAL. WATER CODE § 13050(h) (West 1992). Section 13050(f) of the California Water Code generally describes the beneficial uses that may be protected.

programs.⁷⁹ The San Diego MS4 permit adds some additional detail:

[T]he definition of MEP is dynamic and will be defined by the following process over time: municipalities propose their definition of MEP by way of their Urban Runoff Management Plan. Their total collective and individual activities conducted pursuant to the Urban Runoff Management Plan becomes their proposal for MEP as it applies both to their overall effort, as well as to specific activities (e.g., MEP for street sweeping, or MEP for municipal separate storm sewer maintenance).⁸⁰

In the absence of a proposal acceptable by the co-permittee, the San Diego Regional Water Quality Control Board (SDRWQCB) retains the control to define MEP.

The San Diego MS4 permit requires co-permittees to meet both the MEP standard and water quality standards.⁸¹ An iterative, consensus-based process is to be used when a storm water discharge exceeds water quality standards. If a receiving water quality standard is exceeded, the co-permittee is required to submit a written report identifying the additional best management practices (BMPs) or other measures that will be taken to achieve water quality standards. The co-permittee is then required to revise its JURMP and implement the revised plan.⁸² This approach carries the benefit of building into the process experimentation based on actual practices.

Once this protocol has been completed, the co-permittee “does not have to repeat the same procedure for continuing or recurring exceedances to the same receiving water limitations unless directed by the SDRWQCB to do so.”⁸³ This process of attempting to achieve compliance with the water quality standard is an application of the MEP standard. Properly understood, the iterative protocol is consistent with the MEP standard.

There may be instances, however, when the iterative process does not sufficiently protect the public interest. This would occur in cases when continuing or recurring exceedances of water quality standards occur.⁸⁴

79. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, STORM WATER PHASE II COMPLIANCE ASSISTANCE GUIDE § 4.6.1 (2000).

80. *Order No. 2001-01*, *supra* note 6, at D-3.

81. *Id.* at 9.

82. *Id.* at 10–11.

83. *Id.* at 11.

84. Industrial dischargers must meet the effluent provisions found in section 1311 of the United States Code. 33 U.S.C. § 1342(p)(3)(A) (2000). Section 1311 requires that dischargers, including industrial dischargers, “shall . . . achiev[e] . . . any more stringent limitation, including those necessary to meet water quality standards . . .

In this situation, the permit gives the SDRWQCB the right to mandate that increased steps be taken by the co-permittee to achieve water quality standards.⁸⁵

One may argue that the San Diego MS4 permit violates the MEP requirement of section 402(p). The BIA, for example, argued that the co-permittees are required to implement more onerous BMPs, regardless of whether those additional BMPs exceed the MEP standard.⁸⁶ This claim appears to be an attack, albeit indirect, on the use of water quality standards in the permit. If so, the argument should be assessed based on the decision in *Defenders of Wildlife v. Browner*.⁸⁷

In *Defenders of Wildlife*, the plaintiffs argued that the EPA was required or mandated by the CWA to use state water quality standards in the contested MS4 permit.⁸⁸ The Ninth Circuit upheld the EPA's discretion to use or not use water quality standards in the challenged storm water permit.⁸⁹ In other words, the court held that the EPA has the discretionary authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.

The state board followed this reasoning in the administrative challenge to the San Diego MS4 permit when it concluded that "[t]he Regional Water Board appropriately required compliance with water quality standards and included requirements to achieve reduction of pollutants to the maximum extent practicable."⁹⁰ According to the state board's reading of *Defenders of Wildlife*, regional boards generally are empowered to issue MS4 permits that require compliance with water quality standards through iterative BMPs.⁹¹

Alternatively, the BIA's claim may be that the permit requires "zero contribution" of pollutants in runoff, and "in effect" contains numeric

established pursuant to any State law or regulation" 33 U.S.C. § 1311. This approach is consistent with the one taken by the NPDES permit for storm water discharges by Caltrans. See State Water Res. Control Bd., Order No. 99-06-DWQ, ¶ C-1-3 (July 15, 1999), available at <http://www.swrcb.ca.gov/resdec/wqorders/1999/wqo99-06.html>. Unfortunately, the situation with respect to MS4 permitting is not clearly stated.

85. Order No. 2001-01, *supra* note 6, at 11–12.

86. Petition for Writ of Mandate, *supra* note 57, at 13.

87. 191 F.3d 1159 (9th Cir. 1999).

88. *Id.* at 1161.

89. *Id.* at 1166.

90. *In re Bldg. Indus. Ass'n of San Diego County & W. States Petroleum Ass'n*, SWRCB Order WQ 2001-15, 16 (Nov. 15, 2001), available at <http://www.swrcb.ca.gov/resdec/wqorders/2001/wqo/wqo2001-15.pdf>.

91. To ensure that MS4 discharges comply with water quality standards, the state board has adopted the EPA's language which dictates implementation of an iterative process when water quality standards are not met. State Water Res. Control Bd., Order No. WQ-99-05, at 1 (June 17, 1999), available at <http://www.swrcb.ca.gov/resdec/wqorders/1999/wqo99-05.html>.

effluent limitations. This view is also problematic. This argument was addressed by the state board when it observed, “this simply is not true.”⁹² The state board concluded that “[t]he permit is clearly BMP-based, and there are no numeric effluent limitations.”⁹³ Although the state board recognized the option of using numeric effluent discharges where site-specific conditions call for them, the state board obviously thought that the emphasis in the San Diego MS4 permit was on the use of BMPs.

C. Section 101(b) of the Clean Water Act and Local Authority

The BIA contends that the MS4 permit violates the general provisions of the CWA.⁹⁴ It argues that these CWA provisions preserve and protect “the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources”⁹⁵ In the BIA’s view, the permit unlawfully interferes with the valid exercise by local government of its land use authority.⁹⁶ The BIA specifically identifies the JURMP (section F of the permit) as objectionable based on this theory. Among other contentions, it identifies the “development project approval processes” as infringing on the co-permittees’ right to regulate land use and “unlawfully direct the co-permittees to regulate” as the regional board and state board see fit.⁹⁷

In assessing the force of this argument, one should first realize that federal law directs states to comply with the dictates of section 402(p) of the CWA. Next, it is apparent that section 101(b) of the CWA preserves the rights of the states, not local government.

The California Constitution grants cities the power to “make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”⁹⁸ However, there are two limitations stated in this constitutional grant of power. One is the jurisdictional or territorial limitation, and the other is

92. *In re Bldg. Indus. Ass’n of San Diego County & W. States Petroleum Ass’n*, SWRCB Order WQ 2001-15, at 8 n.17 (Nov. 15, 2001), available at <http://www.swrcb.ca.gov/resdec/wqorders/2001/wqo/wqo2001-15.pdf>.

93. *Id.*

94. Petition for Writ of Mandate, *supra* note 57, at 13.

95. *Id.* (citing 33 U.S.C. § 1251(b) (2000)).

96. *Id.*

97. *Id.* at 13–14.

98. CAL. CONST. art. XI, § 7.

the subordination of local authority to state law.

Local land use authority is conferred by the California Constitution. In exercising this authority, local government is constrained by the general laws of the state. The Porter-Cologne Act grants the state and regional boards the authority to issue and administer storm water permits. To the extent that this is seen as interfering with the authority of local government, as is argued by the BIA, this authority arguably has been preempted by the action of the California Legislature.⁹⁹

Finally, there are questions of policy that should inform the analysis. Monitoring data for San Diego indicates that approximately fifty percent or more of the total pollutant load for many constituents are contributed by urban land uses, including residential, commercial, and industrial activities.¹⁰⁰ It seems reasonable to conclude that the prior land use policies and practices intended to protect water quality from the impacts of urban development have not been entirely effective. Thus, a statewide interest exists in controlling the adverse impacts of storm water pollution, and the state, acting through its regional boards, should be accorded the opportunity to try creative solutions to rectify an admittedly serious problem. Broadly implemented new strategies and techniques, which transcend local interests, are necessary to effectively deal with the problem. These new storm water approaches are based on EPA and state board guidance, and are supported by recent and ongoing technical support. In the final analysis, the JURMP, as well as other parts of the San Diego MS4 permit, appears consistent with directions contained in section 101(b) of the CWA .

D. Watershed and Third Party Liability Considerations

In the United States, the concept of water resources management within watersheds can be detected in early judicial decisions. In 1795, for example, the court in *Merritt v. Parker*¹⁰¹ observed that “water flows in its natural channel, and ought always to be permitted to run there, so that all, through whose land it pursues its natural course, may continue to enjoy the privilege of using it for their own purposes.” This view led to the “natural flow” rule that allowed riparian landowners to use the natural flow of a river, and prohibited any diversion that would materially affect the flow to others on the river.¹⁰² Other early views, such as riparian rights only attaching to land within the watershed,

99. See *supra* notes 27–29 and accompanying text.

100. WOODWARD CLYDE, 1997–1998 CITY OF SAN DIEGO AND CO-PERMITTEE NPDES STORMWATER MONITORING PROGRAM REPORT 6–19 (1998) (on file with author).

101. 1 N.J.L. 526, 530 (1795).

102. *Id.*

support the notion that water resource management was an important part of the law at the founding of our country.¹⁰³

The early focus on water resources management stressed the efficient use of water for such uses as energy generation, navigation, farming, and drinking water. In contrast, watershed management, a concept incorporated into the San Diego MS4 permit, is broader in scope. It calls for decisionmaking on an integrated or holistic basis. A “watershed,” “river basin,” or “drainage basin” approach focuses on the entire surface drainage area of the hydrological unit. It calls for an analysis of the various land use activities within the watershed.¹⁰⁴ In much the same way that air pollution transcends the jurisdictional lines between communities, land use activities often bear little or no relationship to government-drawn boundaries. Thus, it is predictable that urban runoff will not respect or follow politically defined boundaries. Except to the extent that it is channeled, it is not a startling proposition that urban runoff inevitably flows in its natural channels throughout a particular watershed.

The San Diego MS4 permit requires co-permittees to establish a WURMP.¹⁰⁵ Watershed planning involves four steps: (1) identification of the shared watersheds; (2) the identification, assessment, and prioritization of the natural, social, and other watershed resources; (3) prioritization of areas for growth, protection, and conservation; and (4) development of plans and regulations to guide growth and protect resources.¹⁰⁶ Because the land use actions within the watershed have both an interrelated and cumulative impact, co-permittee collaboration is essential to minimizing receiving water quality degradation from land use activities.

Broad legal authority exists in the CWA, accompanying regulations, and California Water Code¹⁰⁷ to use a watershed approach in water

103. See, e.g., *Town of Gordonsville v. Zinn*, 106 S.E. 508, 511–14 (Va. 1921) (discussing generally cases and treatises on riparian rights).

104. *Order No. 2001-01*, *supra* note 6, at 42.

105. *Id.* at 44.

106. SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD, FACT SHEET/TECHNICAL REPORT FOR SDRWQCB ORDER NO. R9-2002-0001 68 (2001) [hereinafter SDRWQCB FACT SHEET].

107. Regional Water Quality Control Boards are organized in California on watershed or drainage basin principles. See CAL. WATER CODE § 13200 (West 1992). The San Diego region, for example, comprises all basins draining into the Pacific Ocean between the southern boundary of the Santa Ana region and the California-Mexico border. *Id.* § 13200(f); see also *id.* § 13777 (dealing with the implementation of CWA provisions).

quality planning. In the CWA's declaration of goals and policies, Congress requires federal agencies to "co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources."¹⁰⁸ Other provisions of the CWA more clearly identify the call for using watershed principles. Section 319, dealing with state nonpoint source management programs, provides that "[a] State shall, to the maximum extent practicable, develop and implement a management program under this subsection on a watershed-by-watershed basis within such State."¹⁰⁹

Courts have also recognized the relevance of watershed principles. In *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*,¹¹⁰ the Supreme Court endorsed a watershed approach in the context of 401 certification.¹¹¹ The Court held that states could condition certification of the project on any limitations necessary to ensure compliance with state water quality standards or other appropriate requirements of state law, and that the state's authority to impose minimum flow requirements is not limited on theory that it interfered with the Federal Energy Regulatory Commission's authority to license hydroelectric projects.¹¹² In a broad sense, the decision allows states to protect aquatic ecosystems within the framework of the watershed unit.

Section 402(p) authorizes the issuance of MS4 permits on a jurisdiction or system-wide basis.¹¹³ The federal regulations authorize permits to be issued on a watershed basis,¹¹⁴ and management programs may be similarly based.¹¹⁵ Finally, the State Water Resources Control Board Urban Runoff Technical Advisory Committee recommends that "municipal permits should have watershed specific components."¹¹⁶

A watershed approach inevitably raises interjurisdictional complications. Thus, it is predictable that a common concern raised by co-permittees is potential liability for pollutant contributions to their MS4 system from other jurisdictions. This issue was recently addressed by the Environmental Appeals Board (EAB) in the *City of Irving, Texas* MS4

108. 33 U.S.C. § 1251(g) (2000).

109. *Id.* § 1329 (b)(4) (2000).

110. 511 U.S. 700, 717 (1994).

111. Section 401 of the CWA gives states the authority to certify, condition, or veto federal permits based on state water quality standards. *See* 33 U.S.C. § 1341 (2000).

112. *PUD No. 1 of Jefferson County*, 511 U.S. at 712, 722.

113. 33 U.S.C. § 1342(p)(3)(B)(i) (2000).

114. Storm Water Discharges, 40 C.F.R. § 122.26(a)(3)(ii), (a)(3)(v), (a)(5) (2001).

115. *Id.* § 122.26(d)(2)(iv) ("Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis or on individual outfalls.").

116. SDRWQCB FACT SHEET, *supra* note 106, at attach. 2.

case.¹¹⁷ One of the challenges made by Irving was that the permit made the city liable for the failure of other co-permittees to fulfill their permit obligations.¹¹⁸ In essence, Irving argued that it could incur liabilities for parts of the broader system beyond its operational control.

In analyzing the issue of potential liability for third party co-permittee conduct, the EAB reasoned:

In anticipation of intra-system, multiple-permit approaches to storm water management, the [federal] rules provide:

Co-permittees need only comply with permit conditions relating to discharges from municipal separate storm sewers *for which they are the operators*.

40 C.F.R. § 122.26(a)(iv) (emphasis added). We conclude that the better interpretation here is one that reconciles the text of the permit with the rule upon which it is based, and thus interpret [the permit] to mean that irrespective of any agreements into which Irving might enter related to storm water management, Irving remains ultimately responsible for those portions—and only those portions—of the MS4 within its operational control.¹¹⁹

The appeals board went on to recognize that Irving might enter into legally binding agreements that enlarge the scope of its liability. In such a case, liability would be based on such an agreement, not on the permit's requirement of operational control.¹²⁰

The question of third party liability in the San Diego MS4 permit is apt to stem from finding fifteen. This finding is entitled “Co-permittees’ Responsibility for Illicit Discharges from Third Parties.” It states the following principle:

As operators of MS4s, the Co-permittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to the waters of the United States, the operator of an MS4 that does not prohibit and/or control discharges into its system essentially accepts responsibility for those discharges.¹²¹

The finding does not distinguish between dischargers within the MS4

117. City of Irving, Texas, Mun. Separate Storm Sewer Sys., Environmental Appeal Board, No. 00-18 (July 16, 2001), *available at* <http://www.epa.gov/eab/disk11/irving.pdf> (last visited Jan. 1, 2003). The NPDES MS4 permit was issued to Irving, the Dallas County Utility and Reclamation District, the Dallas County Flood Control District (district I), and the Irving Flood Control Districts (sections I and III). *Id.* at 2.

118. *Id.* at 7.

119. *Id.* at 25–26.

120. *Id.* at 26 n.19.

121. *Order No. 2001-01*, *supra* note 6, at 4.

territory and those outside the territory.

Presumably the link between this finding and the operative provisions of the permit is the section on the elimination of illicit discharges and connections. It requires each co-permittee to immediately eliminate all illicit discharges, discharge sources, and connections.¹²² This requirement is arguably stricter than the emphasis in the finding on “prohibit and/or control.” To the extent that an interjurisdictional discharge is treated as an improper “discharge source,” the permit requires immediate elimination, not just control. Arguably, the receiving co-permittee is in violation of the permit if it fails to eliminate the discharge.

As a matter of interpretation, a co-permittee should be held accountable only to the extent that it has the power to effectively control the noncomplying interjurisdictional discharge. This construction is informed and based on the finding that the co-permittee should not simply passively standby, which suggests a fault-based standard. Thus, to the extent that the co-permittee has no control and receives no benefit from the interjurisdictional discharge, imposing liability under such circumstances would violate fundamental principles of fairness and contravene a fault-based rationale. The paradigm case of potential unfairness would be where the MS4 system consists of an interjurisdictional natural water course where the receiving co-permittee is forced to accept the discharge.¹²³ One possible solution to this situation is an enforcement action by the regional board against the noncomplying discharger, not the receiving co-permittee. Another is an interjurisdictional agreement on rights and duties.

*E. Proposition 218: Articles XIIC and XIID of the
California Constitution*

The funding of local storm water management programs is important to the future success of storm water regulation in California. In June 2002, the California Court of Appeal for the Sixth District decided *Howard Jarvis Taxpayers Ass’n v. City of Salinas*.¹²⁴ In this taxpayer’s suit against the city of Salinas, the court of appeal held that the city’s storm water drainage fee was invalid because the fee was adopted without being submitted for voter approval as required by proposition

122. *Id.* at 36.

123. *See id.* at 6, finding 28 (“During its downstream course, urban runoff is conveyed through lined and unlined (natural, manmade, and partially modified) channels, all of which are defined as components of the Co-permittees’ MS4.”).

124. 121 Cal. Rptr. 2d 228 (Cal. Ct. App. 2002), *review denied*, 2002 Cal. LEXIS 5938 (2002).

218.¹²⁵ The city did adopt the fee, however, in accordance with the noticing requirements of proposition 218.¹²⁶

Although the California courts previously have wrestled with the application of proposition 218 in other factual contexts, *Salinas* is the first appellate decision applying it to storm water regulation.¹²⁷ This fact is sufficient to make the case important to regulators and those affected by storm water regulation, but there are additional reasons why the case is significant.

The *Salinas* decision has both statewide and local implications. On a statewide basis, the state has assumed the responsibility for controlling storm water under the CWA. Storm water management is implemented and funded at the local level. Funding has been generally accomplished through discharger fees and charges without the benefit or support of federal or state funding. Treating storm water fees as subject to voter approval threatens the viability of many existing municipal storm water management programs. In doing so, California's strategy for controlling storm water discharges through local government is also jeopardized.

The decision also has important local consequences. Municipalities have been increasingly dependent on the ability to impose fees on the end users of the MS4. Local government will be inhibited from using storm water fee programs similar to the one used by *Salinas* without first complying with the voter approval process. On the one hand, the court of appeal decision is likely to breed some degree of uncertainty at the local level. On the other hand, noncompliance with MS4 permit requirements will subject local government to enforcement actions, with accompanying civil liability, brought by regional boards or other citizen suits. The challenge for co-permittees is compounded by the permit application process requirement that funding sources be analyzed.¹²⁸ In short, the *Salinas* decision places co-permittees in a bind.

Given the importance of the *Salinas* decision, a closer look at it is warranted.¹²⁹ The city of *Salinas* maintained separate sanitary and storm

125. *Id.* at 234.

126. *See* CAL. CONST. art. XIIIID, § 6(a).

127. The California Supreme Court recently granted review of a case involving a proposition 218 challenge to a water connection charge for fire suppression. *Richmond v. Shasta Comty. Serv. Dist.*, 47 P.3d 222 (2002).

128. Storm Water Discharges, 40 C.F.R. § 122.26(d)(2)(vi) (2001) ("Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.").

129. The California attorney general has issued two possibly contradictory opinions

water systems, which is common practice in California. In order to fund and comply with the federal CWA storm water requirements, the city adopted a storm water management utility fee. The fee was imposed on every developed parcel of land and the owners and occupiers. The fee was then calculated in proportion to the degree to which the impervious area of the land contributed runoff to the city's storm water drainage system.¹³⁰ Undeveloped property in a natural state was not subject to the fee. The court of appeal found that the storm water fee was subject to voter approval under proposition 218 and was invalid because the fee had not been submitted to the voters for their approval.¹³¹

on the subject of article XIID. In 1998, the attorney general concluded that a Vallejo Sanitation District storm sewer user fee was not exempt under article XIID. 81 Op. Cal. Att'y Gen. 104, 110 (1998). Although the specific concern was the application of section 6(b)(3), *id.* at 105, the attorney general did find the storm water fee "property-related," *id.* at 107. See also CAL. CONST. art. XIID, § 6(b)(3) ("The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel."). In 2001, the attorney general addressed the following question: "May a city impose storm drainage pollution abatement charges with respect to property owned by school districts . . . within the city's boundaries to fund the city's activities in meeting federal stormwater discharge requirements?" 84 Op. Cal. Att'y Gen. 61 (2001). Without considering article XIID, the attorney general found that storm water fees are permissible under section 5471 of the Health and Safety Code, which expressly authorizes cities to establish charges for their storm drainage services. *Id.* at 62. These user fees could be imposed by a city upon local school districts within its boundaries to fund the city's service activities, not capital facilities, in meeting NPDES federal storm water requirements. *Id.* at 65.

130. Historically, Salinas maintained its storm and surface water management system through general fund expenditures. However, faced with the CWA NPDES mandate, on June 1, 1999, the City Council adopted ordinance 2350 to establish a storm water management and discharge control program, and ordinance 2351 to create an enterprise and utility of the city as the means to serve the funding and maintenance of this program. Brief for the Appellant at 3–5, *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 121 Cal. Rptr. 2d 228 (Cal. Ct. App. 2002) (No. H022665).

Ordinance 2351 established a storm water management utility fee imposed upon users of the storm water drainage system, with the basis and amount of the fee to be established by resolution. On July 20, 1999, the Council adopted Resolution No. 17019 establishing rates and regulations for the Storm and Surface Water Management System Enterprise and Utility. This resolution established storm drainage fees in the amount of \$18.66 per year on each single-family residential parcel. For multiple-family and commercial parcels, the annual storm drainage fee was calculated at the rate of \$5.5196 per 1,000 square feet of "impervious area" on the property. The implementing regulations exempt "undeveloped" property, and also allow an exemption or a proportional reduction to developed parcels that have their own maintained storm water management facilities that do not fully utilize city facilities to make no substantial or only a partial contribution of storm or surface water to the city's storm drainage facilities. The purpose of these fees was to provide a method for payment of all or any part of the cost and expense of improving, maintaining, and operating storm and surface water control facilities, including all or any part of the cost and expense for planning, designing, establishing, developing, and constructing such facilities, or to pay or secure the payment of all or any portion of any indebtedness incurred for such purpose. *Id.*

131. *Salinas*, 121 Cal Rptr. 2d at 231.

The California electorate approved proposition 218, which was entitled by its authors as the “Right to Vote on Taxes Act,” on November 5, 1996.¹³² It added articles XIIC and XIID to the California Constitution, and in doing so made numerous fundamental changes to local government finance law. The general thrust of the law was to limit the methods by which local government could exact revenue from taxpayers without their consent.¹³³

The city of Salinas first argued that the storm water fee was not subject to article XIID. If the fee was subject to the general provisions of article XIID, the city then argued that the fee was exempt under the special service fee provisions stated in the law.¹³⁴ Neither argument made by the city was successful.

1. Sections 6 and 2(e) of Article XIID: “Incident of Property Ownership” Fees Require Voter Approval

Several provisions of article XIID were important to the claim before the court of appeal. Article XIID, section 6, deals with the need for voter approval for new or increased fees and charges. It contains the following operative provision:

Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate siding in the affected area.¹³⁵

132. For one of the most authoritative sources on proposition 218, see LEAGUE OF CALIFORNIA CITIES, PROPOSITION 218 IMPLEMENTATION GUIDE (2000), available at <http://www.cacities.org/doc.asp?id=603>. The 1997 Implementation Guide was cited approvingly in *McBrearty v. City of Brawley*, 69 Cal. Rptr. 2d 862, 868 n.5 (Cal. Ct. App. 1997). See generally Robert E. Merritt & Rajiv Parikh, *The Proposition 218 Odyssey: New Challenges for Real Property Development*, 20 REAL PROP. L. REV. 70 (1997) (discussing major changes required by proposition 218, and proposing alternatives for financing public improvements); John S. Throckmorton, *What is a Property-Related Fee? An Interpretation of California's Proposition 218*, 48 HASTINGS L.J. 1059 (1997) (drawing on legislation to discuss the meaning of a “property-related fee”); Mona Patel, Comment, *Is Nothing Certain but Death? The Uncertainty Created by California's Proposition 218*, 35 U.S.F. L. REV. 385 (2001) (arguing for a definition of “property-related fee” that takes into account a direct relationship to property ownership).

133. Proposition 218 § 2, 1996 Cal. Legis. Serv. Prop. 218 (West).

134. *Salinas*, 121 Cal. Rptr. 2d at 232–34.

135. CAL. CONST. art. XIID, § 6(c). The election shall be conducted not less than forty-five days after the public hearing. *Id.* § 6(a)(2).

In applying this section, one must turn to the definition of “fee,” which is found in section 2(e).¹³⁶ The term “fee” is defined as a levy imposed “upon a parcel or upon a person *as an incident of property ownership*, including a user fee or charge *for a property related service*.”¹³⁷ Unfortunately, the triggering provision “as an incident of property ownership” is not defined. Nevertheless, it seems clear that if the fee is not imposed “as an incident of property ownership,” then section 6 of article XIID does not apply and voter approval is not necessary.

Although the phrase “as an incident of property ownership” is not defined, section 2(e) contains the clause, “including a user fee” for a “property-related service.” The scope of the term “property-related service” is defined in section(2)(h) as “a public service having a direct relationship to property ownership.”¹³⁸ Thus, if the user fee has a direct relationship to property ownership then voter approval is required. If the fee is considered indirect, then one would have to determine whether the fee is imposed “as an incident of property ownership.” This methodology would be necessary because of the direct relationship to a property requirement.

Salinas argued the drainage fee was a user fee that was commensurate with the cost of providing the storm water service to those who elect to use the service.¹³⁹ The fee was not imposed as an incident of property ownership or as a user fee for a property-related service. Its theory was that a property owner could be exempt or have the fee proportionally reduced by maintaining a storm water management facility on the property or avoid the fee in its entirety by leaving the property in its natural state. Thus, because an owner or occupier might own property without being subject to the fee or have it reduced by not fully utilizing the drainage system, the fee was not being imposed as an incident of property ownership.

The court found that the storm water fee was a property-related service because it was closely tied to the physical properties of the parcel.¹⁴⁰ The fee was tied to the physical properties of the parcel because developed parcels with larger impervious areas were charged more than those with comparably rain-absorbing parcels. In simple terms, the court seemed to be saying that “if you own developed property, you have to pay the storm water fee” and that makes it directly related to property ownership. The options of maintaining a storm water

136. *Id.* § 2(e).

137. *Id.* (emphasis added).

138. *Id.* § 2(h).

139. *Salinas*, 121 Cal. Rptr. 2d at 230.

140. *Id.*

management facility on the property or securing a proportional reduction was characterized as misleading because “it suggests that the property owner can avoid the fee altogether by declining the service.”¹⁴¹ In its analysis, the court did not consider the possibility of avoiding the fee by leaving it in its natural state.

In applying article XIID, the court relied on the principle that words should be given their natural and ordinary meaning so as to effectuate the purpose of proposition 218. The voters had directed that “[t]he provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.”¹⁴² To interpret the fee as a use-based fee, the court reasoned, would contravene the stated objectives of voters’ purpose as expressed in proposition 218.¹⁴³

The California Supreme Court decision in *Apartment Ass’n of Los Angeles v. City of Los Angeles*¹⁴⁴ is fundamental to understanding the application of article XIID. It was the first decision by the California Supreme Court analyzing article XIID, section 6. The court held that a city-imposed fee on residential rental properties for the purpose of funding a program for the eradication of substandard housing was not subject to article XIID, section 6.¹⁴⁵ It reasoned that the challenged fee, which was imposed without meeting the noticing or voting requirements of article XIID, was imposed on its subjects because of their business ownership, renting apartments, not because they were landowners.¹⁴⁶ The fee was more in the nature of business license charge than an exaction against the property because the fee was imposed only on those who engaged in the residential rental business. In the words of the court, “[i]n this case, the relationship between the city’s inspection fee and property ownership is indirect—it is overlain by the requirement that the landowner be a landlord.”¹⁴⁷

The court reasoned that the plain meaning of article XIID, section 6

141. *Id.* at 231.

142. Section 5 of proposition 218 provides: “Liberal Construction. The provisions of this act shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.” Proposition 218 § 5, 1996 Cal. Legis. Serv. Prop. 218 (West).

143. *Salinas*, 121 Cal. Rptr. 2d at 231.

144. 14 P.3d 930 (Cal. 2001).

145. *Id.* at 937–40.

146. *Id.* at 937–38.

147. *Id.* at 938.

was “that it applies only to exactions levied solely by virtue of property ownership.”¹⁴⁸ This language established a bright line test for assessing the voter approval requirements. Thus, if the fee for storm water services is not imposed solely because the subject is a property owner, the voting approval provisions do not apply.

There are several arguments that the *Salinas* decision wrongly applies section 6. First, the court of appeal decision appears to be at odds with the supreme court’s test in *Apartment Ass’n of Los Angeles* that the fee be levied solely by virtue of property ownership.¹⁴⁹ The storm water fee applies because the drainage activities from the property contribute storm water to the city’s storm sewer system. The size of the fee relates to the type of use, the imperviousness of the surface, and the discharge to the storm sewer system, not to property ownership. Another consideration militates against treating the fee as based solely on property ownership—not all property owners have to pay. To the extent the property owner ceases to contribute storm water to the system, the fee is not applicable. Thus, the fee seems more tied to the demand placed on the MS4 than on the property ownership.

Second, the *Salinas* decision did not examine whether the storm water fee is based on an incident of property ownership. Rather, it shifted the analysis to whether the storm water fee is a user fee or charge for a property related service. The court of appeal concluded that: “Resolution No. 17019 plainly established a property-related fee for a property-related service, the management of storm water runoff from the ‘impervious’ areas of each parcel in the City.”¹⁵⁰

Assuming for the sake of argument that the issue is determined by whether the fee is a “property-related service,” the public service is required to have a “direct relationship to property ownership.”¹⁵¹ To the extent that the service is indirectly related, the fee should not be deemed

148. *Id.*

149. The decision also appears at variance with the court of appeal’s decision in *Howard Jarvis Taxpayers Ass’n v. City of Los Angeles*, 101 Cal. Rptr. 2d 905 (Ct. App. 2002). The second district held that water rates established by Los Angeles were charges for water service based primarily on the amount consumed. *Id.* at 908. The rates were not fees for a property-related service, and thus the water rates were not subject to article XIID. *Id.* This decision supports the view that storm sewer charges based primarily on the amount of service rendered or consumed would be exempt from voter approval. The sixth district attempted to distinguish this decision by saying: “[t]his is not a charge directly based on or measured by use, comparable to the metered use of water or the operation of a business” *Howard Jarvis Taxpayers Ass’n v. City of Salinas*, 121 Cal. Rptr. 2d 228, 231 (Ct. App. 2002). No judicial authority supports the view that a user fee depends on the existence of a metering device.

150. *Salinas*, 121 Cal. Rptr. 2d at 230.

151. CAL. CONST. art. XIID, § 2(h) (“‘Property-related service’ means a public service having a direct relationship to property ownership.”).

property-related. If indirectly related, this would mean that the issue must be analyzed under the controlling “incident of property ownership” clause because the subordinate “property-related fee” clause coverage does not cover all the possible fees and charges falling within the scope of article XIID, section 6.

As previously noted, the storm water fee is based on impervious surface area, which is used to calculate the proportional share of the cost to operate and maintain the storm sewer system. Since the storm water fee is related to the amount of storm water runoff generated on the property, in the same way that the inspection fee in *Apartment Ass’n of Los Angeles* was related to the activity of renting, the amount of storm water contributed to the MS4 is at most indirectly related to the ownership of the property. Because the fee can be avoided by not contributing storm water to the MS4 system, the fee arguably is indirectly related to property ownership. As a result, the proper inquiry, which was not done by the court of appeal, is whether the fee is imposed solely as an incident of property ownership.

If the term “incident of property ownership” is applied in a manner consistent with its ordinary meaning, the term would mean that the fee must be paid solely because the person owns property, and for no other reason. This construction is consistent both with the *Apartment Ass’n of Los Angeles* decision and the focus of proposition 218 on the property ownership. From this perspective, the storm water fee is related to the discharge and management of storm water from the property rather than being inseparably connected to property ownership.

2. Section 6(c) of Article XIID: Exemption for Sewer, Water, and Refuse Collection Services

As noted above, the requirement for voter approval for new or increased fees and charges is subject to the following exception contained in section 6(c): “Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased” without voter approval.¹⁵² To the extent that the storm water fee is for sewer or water services, it is exempt from the article XIID voter approval requirement.

As a matter of statutory construction, exemptions to the general purpose of the statute are strictly construed. Furthermore, the one

152. *Id.* § 6(c).

seeking the benefit of the exemption must establish its application.¹⁵³ But these established principles operate within the confines of the words actually used, in this case by the voters, and is not a fishing license to go beyond those words.¹⁵⁴

Article XIID does not define the term “sewer.” The court of appeal in *Salinas* begins its analysis by finding the term “sewer” ambiguous or otherwise imprecise. It then sought to resolve this difficulty by relying on voter intent.

The starting point then is whether the term is in fact ambiguous or too imprecise. Plaintiffs’ Taxpayers Association claimed that the exemption was inapplicable. It argued that section 6(c) does not distinguish between the sanitary sewer system and the storm sewer system. Section 5(a) of article XIID, as well as the city’s ordinance, distinguishes sewers from “drainage” systems,¹⁵⁵ and thus, an ambiguity exists.¹⁵⁶ Plaintiffs then argued the constructional maxim that “if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted.”¹⁵⁷ The obvious purpose of the argument was to confirm the ambiguity and then to offer a narrow reading of the exemption, one that confined its application to sanitary sewers.

In contrast, the city argued that the commonly accepted dictionary meaning of the term “sewer” includes both sanitary and storm sewers.¹⁵⁸ Thus, the reference is not ambiguous and the exemption applies to both. It supported its view that storm drains are simply a type of sewer by citing the Public Utilities Code,¹⁵⁹ as well as the Salinas City Code.¹⁶⁰

153. *City of Lafayette v. E. Bay Mun. Util. Dist.*, 20 Cal. Rptr. 2d 658, 665 (Ct. App. 1993).

154. *See* *Howard Jarvis Taxpayers Ass’n v. City of San Diego*, 84 Cal. Rptr. 2d 804, 808 (Ct. App. 1999), *review denied*, 1999 Cal. LEXIS 5631 (Cal. Aug. 18, 1999):

Proposition 218 provides it is to be liberally construed (Proposition 218, § 5). Liberal construction cannot overcome the plain language of Proposition 218 limiting the scope of its assessments to assessments based on real property. Nor is there anything in the language of Proposition 218, or in the ballot arguments, that supports a conclusion Proposition 218 was intended to encompass assessments imposed in the 1989 Act. Nothing in the ballot arguments or language of the proposition would have alerted the electorate to such a construction.

155. CAL. CONST. art. XIID, § 5(a) (“Any assessment imposed exclusively to finance the capital costs or maintenance and operation expense for . . . sewers, water, flood control, drainage systems or vector control.”).

156. *Howard Jarvis Taxpayers Ass’n v. City of Salinas*, 121 Cal. Rptr. 2d 228, 232–33 (Ct. App. 2002).

157. *Id.* at 232 (quoting *In re Marquis D.*, 46 Cal. Rptr. 2d 198, 207 (Ct. App. 1995)).

158. *Id.*

159. CAL. PUB. UTIL. CODE § 230.5 (West 1975) (“Sewer system” encompasses all

Other arguments were available, but not made. The Government Code provisions on conveyance works in connection with sewer or drainage improvements inclusively refer to any sanitary sewer, storm sewer, or drainage improvements.¹⁶¹ Furthermore, numerous California cases have refused to distinguish between sanitary sewers and storm drains.¹⁶²

The court of appeal in *Salinas* found the term “sewer” ambiguous, and then resolved the constructional issue in terms of what most voters would have thought the term “sewer” to mean. It reasoned, “[t]he popular, nontechnical sense of sewer service, particularly when placed next to ‘water’ and ‘refuse collection’ services, suggests the service familiar to most households and businesses, the sanitary sewerage system.”¹⁶³ The voters’ intent, in the court’s opinion, was that the term “sewer” included only the sanitary sewer services, and therefore, the exemption did not apply.

But the term “sewer” is not ambiguous. This result was divined more by judicial fiat than by reference to any supporting evidence, such as that contained in the information pamphlet or other statements to the public accompanying proposition 218. The failure to cite such evidence was understandable. No such evidence was available. The guiding principle

property connected with “sewage collection, treatment, or disposition for sanitary or drainage purposes, including . . . all drains, conduits, and outlets for surface or storm waters, and any and all other works, property or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters.”).

160. The City of Salinas defines the term “storm drain” as “a sewer which carries storm and surface waters and drainage, but which excludes sewage and industrial wastes other than runoff water.” *Salinas*, 121 Cal. Rptr. 2d at 232 n.6 (quoting SALINAS, CAL., CODE § 36-2).

161. CAL. GOV’T CODE § 23010.3 (West 1988).

Upon adoption of an authorizing resolution by the board of supervisors, in connection with the construction of any sanitary sewer, storm sewer, or drainage improvements, a county may expend any of its available funds for any additional cost of construction of any conveyance works in excess of the construction required for the current project

Id.

162. See, e.g., *Los Angeles County Flood Control Dist. v. S. Cal. Edison Co.*, 333 P.2d 1, 3 (Cal. 1959) (citations omitted).

In *Southern California Gas Company v. Los Angeles* we stated that “In the absence of a provision to the contrary it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets. The laying of sewers is a governmental as distinct from a proprietary function under the foregoing rule.” In this respect no distinction has been made between sanitary sewers and storm drains or sewers.

Id. (citations omitted).

163. *Salinas*, 121 Cal. Rptr. 2d at 233.

of statutory construction to ascertain voter intent by turning to the words actually used by the electorate was brushed aside. Courts should interpret and apply the words according to their ordinary meaning,¹⁶⁴ which the court of appeal failed to do.

The court of appeal would have been well advised to recall the California Supreme Court's warning on the slippery slope of voter intent:

We observed many years ago that even the most conscientious voters may lack the time to study ballot measures with that degree of thoroughness. Noting the tendency of voters to rely on the title to describe the content of an initiative, we agreed implicitly with the Supreme Court of Oregon whose observation we quoted:

"... The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon. . . . We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law initiated by petition who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage."

Those observations are no less pertinent today. "Voters have neither the time nor the resources to mount an in depth investigation of a proposed initiative. Often voters rely solely on the title and summary of the proposed initiative and never examine the actual wording of the proposal."¹⁶⁵

The court of appeal's analysis was not informed by the CWA provisions on storm water regulation, which predate the adoption of article XIID. As the earlier discussion reveals, both sanitary sewer discharges and storm water discharges are subject to regulation as point sources for purposes of NPDES permitting. The decision to treat them differently for purposes of applying article XIID tends to undermine effective federal and state control by recognizing voter barriers to the management and control of storm water. As a general matter, that

164. See *People v. Knowles*, 217 P.2d 1, 5 (Cal. 1950).

[The speculation brush cuts] with the pertinent question: what purpose did the Legislature seek to express as it strung those words into a statute? The court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids, the history of the statute, the legislative debates, committee reports, statements to the voters on initiative and referendum measures. Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.

Id. at 5.

165. *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n*, 799 P.2d 1220, 1236 (Cal. 1990) (citations omitted).

reasoning also ignores that low-flow storm water diversion facilities and structures, which divert storm water to the sanitary sewer system, are realities in many jurisdictions.

The court of appeal's reasoning produces a paradoxical result. Both sanitary sewers and storm sewers carry waste that is harmful to public health, welfare, and safety. Because sanitary sewer fees are exempt from the voter approval process, cities may be encouraged to require that storm water discharges be made to the sanitary sewer system in order to allow the cost of operation to be recovered by seeking safe harbor under the section 6(c) exemption. But this type of unintended incentive may overload the sanitary system to the detriment of the public by necessitating expanded sanitary system capital improvements.

The court of appeal also found that the exemption for "water service" applied only to the supply of water, not the disposal of storm water.¹⁶⁶ It reasoned "we cannot subscribe to the City's suggestion that the storm drainage fee is 'for . . . water services.'"¹⁶⁷ After the adoption of proposition 218, the legislature enacted section 53750 of the Government Code to clarify some of the terms used in articles XIII C and XIII D, including "water" which was not defined. Section 53750 defines "[w]ater" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."¹⁶⁸ Thus, the average voter, in the court's view, would envision the term "water service" as pertaining only to the supply of water for personal, household, and commercial use, not the provision of storm water services.¹⁶⁹ This conclusion, at least when based on the average voter at the time proposition 218 was enacted, may be considered suspect because the legislative clarification occurred after the constitutional provision was adopted by the voters. To the extent that the clarification is considered more in the nature of amending or changing the scope of the proposition, the legislative action would be impermissible because of its status as a constitutional amendment.¹⁷⁰

This concern to one side, there are several aspects to the legislative clarification of "water" services that suggest that this exemption actually

166. Some jurisdictions tie the storm water fee to water service, and the storm water fee may appear as a separate line item on a customer's water and sewer bill. *See, e.g.,* SAN DIEGO, CAL., MUNICIPAL CODE § 64.0408 (2001).

167. *Salinas*, 121 Cal. Rptr. 2d at 234.

168. *Id.*

169. *Id.*

170. *See* CAL. CONST. art. II, § 8(a).

encompasses the storm water system. Traditional water service or supply is also linked to the storm water system. Runoff from over-watered lawns, car washing activities by homeowners, and countless other activities contributed water to the storm system. Management fees for these activities seemed clearly tied to water services. Moreover, to the extent that storm water is stored on a temporary basis, used for ground water recharge, treated through either on-site treatment facilities in the MS4 or low-flow diversion projects connected to the sanitary sewer system, or treated through the incorporation of wetlands into the MS4, the exemption might be considered consistent with the legislative clarification of water services.

The California Supreme Court has declined to review the court of appeal decision in *Howard Jarvis Taxpayers Ass'n v. City of Salinas*. Therefore, municipalities are left to cope with the decision as they search for a reliable funding source to allow them to comply with storm water requirements. In doing so, there are several options available to affected local agencies.

One option is to use a storm water fee that satisfies the noticing and voter approval requirements of article XIID.¹⁷¹ Section (6)(c) requires approval by a majority vote of the property owners subject to the fee or, at the option of the fee imposing agency, by a two-thirds vote of the electorate residing in the affected area.¹⁷² This option will necessitate convincing the voters to support such a fee.

A second approach, one which would obviate the need for voter approval, would meet the objections with the fee identified in *Salinas*. Basing the fee on impervious area made the fee property-related, and thus subject to voter approval. The court of appeal stressed that the city's storm water fee was not based on or measured by use of the storm water service provided. It was not comparable to the metered use of water or the operation of a business.¹⁷³ To the extent that a storm water fee is based on or measured by the ratepayer's use of the MS4, then the voter approval requirements should not trigger section 6. Thus, storm water consumption-based usage rates for using the MS4, which are basically commodity charges, would not fall within the scope of the voter approval requirement.¹⁷⁴

171. Article XIID contains noticing and hearing procedures applicable to new or increased fees and charges that are property related. CAL. CONST. art XIID, § 6(a). These are in addition to the voter approval requirements contained in section 6(c).

172. "Agency" is defined as any local government as defined in section 1(b) of article XIIC. *Id.* § 2(a). The term "'local government' means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity." *Id.* art. XIIC, § 1(b).

173. *Salinas*, 121 Cal. Rptr. 2d at 231.

174. To comply with *Salinas*, the storm water rate structure should be correlated to

A third possibility, one which was not raised or considered in *Salinas*, would be to rely on the section 6(c) exemption for “refuse collection services.” This possibility would be based on regulating the waste found in storm water. Storm water regulation is premised on controlling the waste in storm water. As previously discussed, much of the waste that finds its way into the MS4, such as trash, pesticides, and oils, fits within the term “refuse” that has not been otherwise properly disposed of or controlled. Undoubtedly, basing a storm water fee on the refuse exemption would be challenged. To the extent that the *Salinas* voter-intent test is used to ascertain the scope of the exemption, this argument may be difficult to sustain. In addition, where refuse collection fees are mandatory on property owners, the fees are likely to be treated as a property related service subject to article XIID requirements. To the extent such fees are voluntary and can be avoided, the argument may be more persuasive.

VI. CONCLUSION

This Article has focused on the regulation of discharges of waste in storm water from municipal separate storm sewer systems (MS4s). The effective regulation of urban storm water is a daunting challenge, one that is complicated by theoretical, economic, practical, and legal considerations.

Unlike the sanitary sewer waste water, which is treated by a publicly owned treatment work (POTW) before being discharged, storm water usually is discharged to the receiving waters without the benefit of any treatment. While it is theoretically feasible to combine sanitary and storm sewers or to treat storm water before it is discharged, full scale “end-of-pipe” treatment of storm water runoff is not considered economically or technologically feasible at this time.

the services consumed by the ratepayer. In structuring such a system, the analogy to the treatment of sanitary sewer rates, where water delivery is used as an approximation of the amount of wastewater the sewer customer discharges into the sewer system, might be useful. A storm water flat rate for being connected to the water delivery system might be imposed. The storm water fee could be tied to water use, not property ownership. This approach would be useful where the water contributed to the storm water system or runoff was connected to delivered water.

An alternate approach might be to base the fee structure on the amount of storm water runoff beyond that which would be contributed to the MS4 had the property been left in its natural state. The advantage of this approach is that it stresses the election to voluntarily use the service. While arguable as a matter of theory, it should be appreciated that *Salinas* rejected using impervious area, which is similar in approach, as a proxy for use.

In addition to technical and economic difficulties, practical constraints also exist. Storm water is inherently diffuse and sporadic in nature. Both the volume and the velocity of the discharge depend on weather conditions. Urbanization complicates the problem because the capacity of the soil to absorb precipitation depends on factors directly related to urbanization. Urban development generally increases the amount of pollution in the runoff and decreases the opportunity for natural processes to reduce pollutant loads due to the increase of impervious surfaces. These considerations make tracing storm water pollution to specific sources difficult, which further complicates the task of controlling it through regulation. Creative approaches to effectively addressing the problems are needed.

Finally, the problem of storm water regulation has been hampered, at least until recently, by regulatory inertia. Several years ago, a commentator captured the problem of regulatory inertia when he observed: "Separate storm sewers are technically subject to the NPDES program [the Clean Water Act] but can be covered by general permits. For the most part, this means a free ride, with the burden on the regulators to revise the *status quo*."¹⁷⁵

In California, regulatory inertia started to change in the early 1990s when regional water quality control boards began issuing the first round municipal storm water permits under the authority of the CWA. Progress accelerated with the turn of the millennia. Since then, California has continued its leadership role in changing the status quo. The San Diego MS4 permit is at the forefront of California's regulatory effort. Thus, it is a useful vehicle to study some of the important legal issues associated with the regulation of the waste in storm water.

The significance of the storm water problem to society is clear. It is the leading cause of water quality both nationally and in California. Consequently, it should not be surprising that the era of timorous or lax regulation of urban runoff has passed. But its passing has not occurred without legal and political controversy that is likely to continue for the foreseeable future.

175. STENSVAG, *supra* note 10, at 638 (quoting WILLIAM H. RODGERS, JR., 2 ENVIRONMENTAL LAW: AIR AND WATER § 4.31 (1986)).